

ARKANSAS COURT OF APPEALS

DIVISION I, III, and IV

No. CACR08-170

AMANDA GAIL HOLT,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered December 31, 2008

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT,
[NO. CR-07-86]

HONORABLE BARRY ALAN SIMS,
JUDGE,

REVERSED and DISMISSED IN PART

EUGENE HUNT, Judge

1. CRIMINAL LAW – EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT’S CONVICTION FOR THE CHARGE OF MANUFACTURING METHAMPHETAMINE.— Evidence was insufficient to support appellant’s conviction for the charge of manufacturing methamphetamine; the evidence revealed that the items of contraband were found in the master bedroom, not in a common area of the trailer—the owner of the trailer claimed that the bedroom was his and there was no proof to the contrary; none of appellant’s personal belongings were found in the master bedroom; there were no fingerprints linking appellant to the contraband, and there was no other evidence showing that appellant actually shared the bedroom with the trailer owner; appellant’s presence alone was insufficient to support her conviction for manufacturing methamphetamine.
2. CRIMINAL LAW – SUBSTANTIAL EVIDENCE WAS NOT PRESENTED THAT APPELLANT MAINTAINED A DRUG PREMISES.— The State did not present substantial evidence that appellant maintained a drug premises; appellant did not own the trailer—rather she was a mere resident; according to testimony given by one of the police officers, appellant indicated that she had been living there two weeks and that she could not give him permission to search the trailer; there was no evidence that appellant paid rent or that any of the utilities were in her name; there were no facts that connected appellant to maintaining a drug premises.

William R. Simpson, Jr., Public Defender, *Kent C. Krause*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, and *Misty Steele*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar, for appellant.

Dustin McDaniel, Att’y Gen., by: Karen Virginia Wallace, Ass’t Att’y Gen., for appellee.

This appeal by Amanda Gail Holt (Appellant), is from finding of guilt by a jury of manufacturing methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, maintaining a drug premises, and exposing a child to a chemical substance. Appellant received 120 months for manufacturing methamphetamine; 60 months for possession of drug paraphernalia with intent to manufacture methamphetamine; 72 months for maintaining a drug premises; and 120 months each on three counts of exposing a child to a chemical substance or methamphetamine. Appellant contends that the evidence was insufficient to convict. We agree that the evidence was insufficient to support appellant’s convictions for the charges of manufacturing methamphetamine and maintaining a drug premises. Appellant’s convictions for those charges are reversed and dismissed.¹

On September 21, 2006, officers of the Pulaski County Sheriff’s Office received a call about three small children playing in the road unattended at 4108 Vinson Road. Deputy Randy Howard was dispatched to answer the call. Upon Howard’s arrival, the children, ages one, three, and four, were found behind one of the trailers at that location. The youngest child had “no clothes on.” The front door of the trailer was open and Howard was able to make contact with appellant and the trailer’s owner, Michael Hogue. Howard notice a distinct chemical odor of

¹This opinion will only address the two charges against appellant that are being reversed and dismissed on appeal.

what he believed was methamphetamine coming from inside the trailer. Officers from the narcotics division were called to investigate. The officers took a reading and confirmed the presence of phosphine gas. Hogue's parole officer was notified and once the parole officer arrived at the trailer, a search ensued. Several items connected to the manufacture of methamphetamine were recovered from the master bedroom that Hogue occupied. Appellant and Hogue were arrested.

Appellant stood trial on November 11, 2007. Randy Howard of the Pulaski county Sheriff's Office testified that he answered a call at 4108 Vinson Road on September 21, 2006, and that he located three small children playing outside the trailer at that address unattended. He then went to the front door, which was open, and knocked on the side of the trailer. Hogue came from the master bedroom and answered the door. According to Howard, he could smell the strong chemical odor of methamphetamine before he stepped on the porch. Howard asked to speak with the children's mother and Hogue went to get her. Howard stated that he was not sure where appellant came from within the trailer. Appellant told Howard that she did not know that her children were up yet and that she had been asleep. Howard told appellant and Hogue that he was concerned about the children being in the trailer with the strong chemical odor present. Howard testified that he asked the children to come out of the trailer and he then contacted his sergeant. Howard further testified that he then received permission from Hogue to search the outside of the trailer. The same chemical odor that he smelled initially was present around the back of the trailer where the underpinning was missing. Howard stated that due to the strong chemical odor, he could not stand to be inside the trailer long. Howard

testified that there was another bedroom at the other end of the trailer but there was no place for anyone to sleep. Howard was shown a photograph of the trailer and he acknowledged that a mattress was seen leaning against the living room wall. Howard stated on cross-examination that he asked appellant for permission to search and was told that she had only lived there for a couple of weeks and that "it was not her place to give [him] consent."

Kathleen Brewer, of the narcotics division, came to the trailer and took a reading to confirm the presence of a methamphetamine laboratory. Brewer noticed the distinct smell of methamphetamine upon arrival. Brewer conducted a reading near the back door of the trailer, which indicated the presence of phosphine gas. Brewer stated that this reading was significant because phosphine gas is present whenever red phosphorus is used to manufacture methamphetamine. Brewer further stated that phosphine gas is extremely dangerous in very large quantities and that it attaches itself to anything that is wet or has water in it. According to Brewer, the gas destroys the wet tissue of the mucus membranes found in the mouth, nose, lungs, and trachea. Brewer stated that she was present for the search of the trailer and that all evidence of a methamphetamine laboratory was found in the master bedroom. According to Brewer, Hogue claimed the bedroom from which the items were seized.

Chris Holmes, of the narcotics division, was with the parole officer when the trailer was searched. Holmes stated that a bedroom was located to the right of the front door, there was a washroom to the left of the front door, and the kitchen was to the left of the washroom. The living room was located on the other side of the kitchen and another bedroom was located adjacent to the living room. Holmes smelled a strong chemical odor when he first arrived at

the trailer. The master bedroom was searched first. A stained salt container, a gas torch, a razor blade, and a small plastic bag were located on the dresser in the master bedroom. Holmes stated that the items caught his eye because salt containers are usually stained from iodine in methamphetamine laboratories, razor blades are usually used to chop the narcotics, and small plastic bags are used to package narcotics. Hypodermic needles, a glass smoking device, coffee filters, and a spoon were also found in a dresser drawer in the master bedroom. Children's clothing was in one of the drawers, which also contained a hypodermic needle. According to Holmes, coffee filters are used in a methamphetamine lab and the other items found were consistent with drug use. A hot plate, which was still warm, was located on the side of the dresser. The hot plate caught Holmes's attention because hot plates are used as heating elements during the cooking stages. A large box containing match boxes and a pair of scissors were found in the closet of the master bedroom. A piece of tubing was also found lying on the closet floor. Holmes testified that tubes are used to transfer gases and other chemicals during the various stages of manufacturing methamphetamine. A camp fuel can and a glass jar were found wrapped in a blanket on the bed. Holmes stated that camp fuel is used for a number of things in a methamphetamine lab and that glass jars are used to store chemicals and chemical components. A black leather-like satchel was found beneath the edge of the headboard. According to Holmes, the satchel contained several items, including a liquor bottle containing a bi-layer liquid; two plastic bottles, consistent with an HCL generator, which contained a white granular substance; a hydrogen peroxide bottle; a bottle containing a blue cloudy liquid, which was consistent with a pill soak; two bottles containing a blue cloudy substance; a red plastic

bottle; a bottle of drain opener; and bottle caps with tubing and electrical tape. Holmes stated that the items in the satchel were consistent with a methamphetamine lab. Holmes testified that windows had to be opened so that the trailer could air out. The items were subsequently taken to the sheriff's office where they were sampled. Holmes stated that fingerprints were not taken from the items because there were persons found inside the trailer and the "meth lab" was not abandoned. Holmes also stated that he did not witness the manufacturing of methamphetamine.

Norman Kempler of the Arkansas Crime Lab was assigned to test the items found in Hogue's trailer. Kempler stated that the top layer of the bi-layer liquid contained methamphetamine and that the bottom layer was a very strong base. According to Kempler, "the only process after that bi-layer liquid [is formed] is to make meth[amphetamine] into the form that you can actually use it." The cloudy blue liquid contained pseudoephedrine. Kempler stated that the sample was representative of a pill soak. The methanol rinse of the tape contained methamphetamine. The methanol rinse of the syringes contained methamphetamine. The glass smoking device contained methamphetamine. However, the methanol rinse of the plastic tube only showed the presence of iodine. According to Kempler, when methamphetamine is manufactured inside a residence, residual contamination remains. This is true because methamphetamine will spread throughout the structure and contaminate all surfaces.

Appellant unsuccessfully moved for directed verdict on all charges at the conclusion of the State's case. Appellant did not testify. Appellant renewed her motions for directed verdict at the conclusion of all the evidence. Appellant's motions were denied. The jury found appellant guilty of all charges and sentenced her to a total of 612 months in the Arkansas

Department of Correction. The judgment and commitment order was entered on October 18, 2006. Appellant filed her notice of appeal on November 14, 2006.

Standard of Review

A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Gikonyo v. State*, 102 Ark. App. 223, ___ S.W.3d ___ (2008). The test for such motion is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Id.* The credibility of witnesses is an issue for the fact-finder and not for the appellate court. *Id.* The fact-finder may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Id.*

I. Manufacturing methamphetamine

Appellant was charged with the violation of Arkansas Code Annotated section 5-64-401(a)(1) (Repl. 2005), which provides that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, including the manufacturing of a controlled substance, methamphetamine. In order to convict appellant of this charge, the State was required to prove that appellant produced or prepared methamphetamine. *Smith v. State*, 68 Ark. App. 106, 109, 3 S.W.3d 712, 714 (1999). At trial, the State sought to prove that appellant manufacture methamphetamine as a principal or an

accomplice. An accomplice shares the same guilt as the principal. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). The mere presence of appellant cannot be the basis of a finding of guilt. *Hutcheson v. State*, 92 Ark. App. 307, 213 S.W.3d 25 (2005); *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977). To convict appellant of manufacturing methamphetamine it must be proven that she exercised control or dominion over the contraband. *Williams v. State*, 94 Ark. App. 440, 236 S.W.3d 519 (2006). Constructive possession may be implied when the contraband is under the joint control of the defendant and another, but joint occupancy alone is not sufficient to establish possession—the State must prove that the defendant exercised control and dominion over the contraband. *Id.*

Control and knowledge of contraband can be inferred from the circumstances, such as proximity of the contraband to the accused, whether the item is in plain view, and ownership of the property where the contraband is found. *See, e.g., Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003) (affirming Cherry's conviction for simultaneous possession of drugs and a firearm, where the gun was found in Cherry's kitchen near items used to manufacture methamphetamine). In *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988), this court reiterated that joint occupancy, coupled with some other factor linking appellant to the contraband, is sufficient proof of constructive possession.

The evidence revealed that the items of contraband were found in the master bedroom; not in a common area of the trailer. Hogue claimed that the bedroom was his. There was no proof to the contrary. Sheriff Howard testified that he did not know where appellant came from when he asked to see her at the door. None of appellant's personal belongings were found in

the master bedroom. There were no fingerprints linking appellant to the contraband. There was also no other evidence showing that appellant actually shared this room with Hogue. Based on these facts, there was no additional evidence linking appellant to the contraband other than her presence. Because we have held that presence alone is insufficient, appellant's conviction for manufacturing methamphetamine must be reversed and dismissed.

Reversed and dismissed part.

HART, GLADWIN, MARSHALL, and BAKER, JJ., agree.

PITTMAN, C.J., ROBBINS, VAUGHT, and HEFFLEY, JJ., dissent.

II. Maintaining a drug premises

Appellant was charged with the violation of Arkansas Code Annotated section 5-64-401(a)(2) (Repl. 2005), which provides that it is unlawful for any person

[k]nowingly to keep or maintain any store, shop, warehouse, dwelling, building, or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance in violation of this chapter or that is used for keeping a controlled substance in violation of this chapter.

To prove appellant's guilt of maintaining a drug premises, the State was required to prove that she helped to maintain a drug premise used for keeping controlled substances. Ark. Code Ann. § 5-64-402(a)(2) (Supp. 2005); 60 Ark. App. 198, 962 S.W.2d 370 (1998). The State concludes that there is substantial evidence that appellant was actively involved in the manufacture of drugs. However, the State offers no proof that appellant maintained a drug premises.

In order to convict on this evidence the circumstances must be consistent with the guilt

of the accused and inconsistent with his innocence, and incapable of explanation on any other reasonable hypothesis than of guilt. When the circumstances are of such a character as to fairly permit an inference consistent with innocence, they cannot be regarded as sufficient to support a conviction. *Ayers v. State*, 247 Ark. 174, 444 S.W.2d 695 (1969).

Appellant argues that there was insufficient evidence that she maintained a drug premises. Examination of the facts shows that appellant did not own the trailer and that she was a mere resident. According to Holmes, appellant indicated that she had been living there two weeks and that she could not give him permission to search. There was no evidence that appellant paid rent or that any of the utilities were in her name. There were no facts that connected appellant to maintaining a drug premises.

On appeal, the only issue we concern ourselves with is, when the evidence is viewed in the light most favorable to the State, does substantial evidence support the judgment? When the State's case is made of circumstantial evidence, if it leaves the fact-finder to speculation and conjecture, then the evidence is insufficient as a matter of law. *King v. State*, 100 Ark. App. 208, 266 S.W.3d 205 (2007).

Reversed and dismissed in part.

HART, MARSHALL, and BAKER, JJ., agree.

GLADWIN and ROBBINS, JJ., agree in part and dissent in part.

PITTMAN, C.J., and VAUGHT and HEFFLEY, JJ., dissent.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. I respectfully dissent from our holdings that there is no substantial evidence to support appellant's convictions of

manufacturing methamphetamine and of maintaining a drug premises. We have affirmed appellant's convictions of possession of drug paraphernalia with intent to manufacture and exposing a child to a chemical substance. Because both of those offenses require substantial evidence to prove that appellant intended to manufacture methamphetamine, and because appellant has admitted that she knew that methamphetamine was in fact being manufactured with that same paraphernalia at the time of her arrest, I think that the fact-finder could plainly infer that appellant was engaged in the manufacture of methamphetamine. To hold, as a matter of law, that the jury could not so find on this evidence is to me inexplicable.

Nor do I believe that there was insufficient evidence to support appellant's conviction for maintaining a drug premises. It is clear that no ownership interest in the premises is required to sustain such a conviction. *See Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995). Thus, I would affirm this conviction based on the reasoning stated by Judge Gladwin in his separate opinion.

VAUGHT and HEFFLEY, JJ., join in this opinion.

ROBBINS, J., joins with respect to the discussion of appellant's conviction of manufacturing methamphetamine.

GLADWIN, J., joins with respect to the discussion of appellant's conviction of maintaining a drug premises.